

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition by the Colorado Public Utilities)	
Commission, Pursuant to 47 C.F.R. §54.207(c),)	
For Commission Agreement in Redefining the)	CC Docket No. 96-45
Service Area of CenturyTel of Eagle, Inc.,)	
A Rural Telephone Company)	
)	
Petition by the Colorado Public Utilities)	
Commission, Pursuant to 47 C.F.R. §54.207(c),)	
For Commission Agreement in Redefining the)	CC Docket No. 96-45
Service Area of Delta County Tele-Comm, Inc.,)	
A Rural Telephone Company)	
)	

**REPLY COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTA),¹ through the undersigned and pursuant to the *Public Notice* released by the Federal Communications Commission's (FCC's or Commission's) Wireline Competition Bureau (WCB)² and pursuant to sections 1.415 and 1.419 of the Commission's rules,³ hereby submits its reply comments in the above-docketed proceeding. In these reply comments, USTA addresses the comments of Western Wireless Corporation (Western Wireless) that the Commission is required to follow FCC Rule Section 54.207(c), which would allow a rural carrier's service area definition to be changed without some demonstration by the Commission that it considered the recommendations of the Federal-

¹ USTA is the Nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

² *Public Notice*, CC Docket No. 96-45, DA 03-26 (rel. Jan. 7, 2003) soliciting comments on a consolidated proceeding regarding the definition of the rural service areas of two rural telephone companies in the state of Colorado (*Public Notice*).

³ 47 C.F.R. §§1.415 and 1.419.

State Joint Board on Universal Service (Joint Board) regarding such a service area redefinition.⁴

USTA also addresses the claims of the Colorado Public Utilities Commission (CO PUC) in the underlying petitions that are a part of this proceeding (*i.e.*, the redefinition of the service areas of CenturyTel of Eagle, Inc. (CenturyTel) and Delta County Tele-Comm, Inc. (Delta County)) in which CO PUC argues that redefinition of the service areas of certain rural incumbent local exchange carriers (ILECs) is necessary to promote competition.⁵

Western Wireless argues that the Commission is obligated to follow the procedure established in Section 54.207(c) of the FCC's rules, which would allow a rural carrier's service area definition to be changed without some demonstration by the Commission that it considered the recommendations of the Joint Board. More specifically, Western Wireless claims that CenturyTel's contention that a specific Joint Board decision is needed for each rural service area redefinition is "strikingly similar" to challenges raised by certain state commissions regarding the application of Section 54.207 and that such challenges were "flatly rejected" by the U.S. Court of Appeals for the Fifth Circuit in *Texas Office of Public Utility Counsel v. FCC*.⁶ While the claims of CenturyTel in this proceeding may be similar to the rule challenges raised by certain state commissions in the *Texas Office of Public Utility Counsel* case, the Fifth Circuit did not address the substantive claims of these state commissions and Western Wireless has mischaracterized the Court's ruling. Similar to CenturyTel, the state commissions in *Texas Office of Public Utility Counsel*

⁴ See Western Wireless Comments at 6.

⁵ See Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. §54.207(c), for Commission Agreement in Redefining the Service Area of CenturyTel of Eagle, Inc. a Rural Telephone Company, CC Docket No. 96-45, filed Aug. 6, 2002, at 4, 12 (CO PUC CenturyTel Petition) and Petition by the Colorado Public Utilities Commission, Pursuant to 47 C.F.R. §54.207(c), for Commission Agreement in Redefining the Service Area of Delta County Tele-Comm, Inc., a Rural Telephone Company, CC Docket No. 96-45, filed Sept. 13, 2002, at 4, 5, 11, 12 (CO PUC Delta County Petition).

contest one aspect of the Order regarding the definition of service areas. The FCC maintains that it may establish a different definition of service areas for rural carriers, with the agreement of the states, without having to submit such a new definition first to the Joint Board. The states argue that the plain language of § 214(e)(5) allows the agency to act only ‘after taking into account recommendations of [the Joint Board]’⁷

Yet, when the Fifth Circuit considered this challenge by the state commissions, it noted that the FCC had procedural responses and a substantive defense. The Court agreed with the Commission that the states had no standing to challenge the Commission’s ruling because they failed to show any harm.⁸ Thus, the Court’s dismissal of the state commissions’ challenge was based on procedure, not substance. The Court did not flatly reject the state commissions’ arguments and thereby uphold the rule. More accurately, the Court simply did not address the substantive challenge.

With regard to Western Wireless’ claim that CenturyTel’s opposition to FCC Rule Section 54.207 now is tantamount to a request for reconsideration of the rule and is time barred,⁹ Western Wireless is, quite simply, incorrect. The Commission’s rule on service area definitions cannot violate the Communications Act of 1934, as amended (Act) and as USTA emphasized in its comments, FCC Rule Section 54.207(c)(3)(ii) is not in accord with the requirement imposed on the Commission by Section 214(e)(5) of the Act (*i.e.*, to take into account the recommendations of the Joint Board before establishing a different service area for a rural telephone company other than its study area). CenturyTel is not barred from challenging a Commission rule that is in conflict with the Act. Despite the rule, the Commission cannot abdicate its responsibility to consider the Joint Board’s recommendation on these service area

⁶ See Western Wireless Comments at 7; *see also Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

⁷ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d at 419.

⁸ See *id.*

⁹ See Western Wireless Comments at 7.

redefinition proceedings. Presumably the Commission is acknowledging this responsibility by putting out for comment again the CO PUC petition regarding the redefinition of CenturyTel's service area. USTA encourages the Commission to consider the recommendations of the Joint Board with regard CO PUC's efforts to redefine the service areas of both CenturyTel and Delta County.

The Colorado Public Utilities Commission argues in the CO PUC CenturyTel Petition and the CO PUC Delta County Petition that redefinition of the CenturyTel and Delta County service areas is necessary to enable competitive carriers to obtain eligible telecommunications carrier (ETC) designation so that they can receive universal support, which will promote competition in those areas.¹⁰ To facilitate these efforts, the Colorado Public Utilities Commission adopted a rule that automatically requires the service area of a rural incumbent local exchange carrier (ILEC) to be disaggregated according to the plan that the rural ILEC chooses for receipt of universal service support.¹¹ As USTA stressed in its comments, this rule, Rule 11, is inconsistent with a previous Commission finding that a rural ILEC's study area should not be automatically disaggregated according to the level of disaggregation that the rural ILEC chooses for receipt of universal service and this rule is inconsistent with Section 214(e)(5) of the Act, which requires the Commission and the states to take into account the recommendations of the Joint Board before redefining a rural ILEC's service area.¹²

Yet, of more fundamental concern in this proceeding, and others like it, is the requirement that a state commission, when designating an additional ETC for an area served by a rural ILEC, find that an additional ETC designation is in the public interest.¹³ Too often, state

¹⁰ See *infra* n. 5.

¹¹ See 4 Code of Colorado Regulations 723-42-11, Use of Disaggregation Paths (Rule 11).

¹² See USTA Comments at 3-4.

¹³ See 47 U.S.C. §214(e)(2).

commissions find that an ETC designation is in the public interest simply because they believe that the presence of an additional carrier in the rural local service market will promote competition. State commissions must do more than consider the presence of additional carriers in the rural local service market in evaluating whether the public interest test for designating additional ETCs is met. More specifically, in rural areas, state commissions should not grant ETC status solely on the basis that such a grant will promote competition without considering the impact that additional ETC designations will have on the viability of universal service. When making a public interest determination regarding ETC designation, state commissions should consider the impact that additional ETCs in a rural area would have on the size of the universal service fund; the costs and benefits of granting additional ETC designations (*i.e.*, whether the benefits of having more than one ETC receive universal service funding outweigh the costs of having more than one ETC); whether a second ETC could serve the entire service area if the original ETC (*i.e.*, the rural ILEC) relinquished its ETC status; whether the carrier seeking ETC designation has a published tariff with terms and conditions under which services will be offered or a plan for building out its network once it receives ETC designation; and whether the carrier seeking ETC designation agrees to demonstrate progress toward achieving its build-out plan in order to retain such ETC designation. In sum, the public interest is served only when the costs of supporting multiple carriers exceed the costs of supporting multiple networks. It is critically important that state commissions take into consideration more than the presence of competitors in the rural local service market when granting ETC status to competitors; they must also ensure that universal service will remain viable so that consumers in rural areas have ongoing affordable local telephone service.

For these reasons and those noted in USTA's comments, the Commission should grant CenturyTel's Application for Review, grant CenturyTel's *ex parte* request to suspend the decision of the Wireline Competition Bureau to let the redefinition of CenturyTel's rural service area take effect, and should not agree to CO PUC's request to redefine the service areas of CenturyTel or Delta County as an area other than their study areas.

Respectfully submitted,

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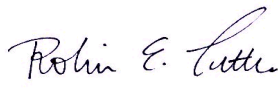
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February 21, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of USTA's Comments was served on this 21st day of February 2003 by electronic delivery or first class, postage prepaid mail to the persons listed below.

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